


IN THE UNITED STATES DISTRICT COURT  
FOR THE WESTERN DISTRICT OF TENNESSEE  
EASTERN DIVISION

FILED BY   
05 NOV 30 AM 9:15  
D.C.  
FORWARD TO CLERK  
CLERK US DISTRICT COURT  
WDC OF TENNESSEE

ALLEN KINNEY III,

Plaintiff,

VS.

RICKY FITZPATRICK,

Defendant.

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No. 05-1026-T/An

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ORDER ASSESSING \$150 FILING FEE  
ORDER OF DISMISSAL  
ORDER CERTIFYING APPEAL NOT TAKEN IN GOOD FAITH  
AND  
NOTICE OF APPELLATE FILING FEE

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Plaintiff Allen Kinney III, prisoner number 182302, who is currently an inmate at the Northpoint Training Center in Burgin, Kentucky,<sup>1</sup> filed a *pro se* complaint pursuant to 42 U.S.C. § 1983 on February 2, 2005 in connection with his previous confinement at the Obion County Detention Center ("Jail") in Union City, Tennessee. The Court issued an order on April 18, 2005 directing the plaintiff to comply with the Prison Litigation Reform Act, 28 U.S.C. § 1915(a)-(b), or pay the \$150 civil filing fee.<sup>2</sup> The plaintiff filed the

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<sup>1</sup> The docket reflects the plaintiff's address at the time he filed the complaint. However, the application to proceed *in forma pauperis* filed on May 9, 2005 shows that plaintiff has since been transferred to the Northpoint Training Center. The Clerk is directed to modify the docket to reflect the plaintiff's current address.

<sup>2</sup> Effective March 7, 2005, the civil filing fee was increased from \$150 to \$250. However, the complaint in this case was filed prior to March 7, 2005; therefore, the \$150 filing fee will be applied.

required documentation on May 9, 2005. The Clerk shall record the defendant as Head Jailer Ricky Fitzpatrick.

I. Assessment of Filing Fee

Under the Prison Litigation Reform Act of 1995 (“PLRA”), 28 U.S.C. § 1915(a)-(b), a prisoner bringing a civil action must pay the full filing fee of \$150 required by 28 U.S.C. § 1914(a). The statute merely provides the prisoner the opportunity to make a “downpayment” of a partial filing fee and pay the remainder in installments.

In this case, the plaintiff has properly completed and submitted both an *in forma pauperis* affidavit containing a certification by the trust fund officer and a trust fund account statement. Pursuant to 28 U.S.C. § 1915(b)(1), it is ORDERED that the plaintiff cooperate fully with prison officials in carrying out this order. It is further ORDERED that the trust fund officer at plaintiff’s prison shall calculate a partial initial filing fee equal to twenty percent (20%) of the greater of the average balance in or deposits to the plaintiff’s trust fund account for the six months immediately preceding the completion of the affidavit. When the account contains any funds, the trust fund officer shall collect them and pay them directly to the Clerk of Court. If the funds in plaintiff’s account are insufficient to pay the full amount of the initial partial filing fee, the prison official is instructed to withdraw all of the funds in the plaintiff’s account, and forward them to the Clerk of Court. On each occasion that funds are subsequently credited to plaintiff’s account, the prison official shall

immediately withdraw those funds and forward them to the Clerk of Court, until the initial partial filing fee is paid in full.

It is further ORDERED that, after the initial partial filing fee is fully paid, the trust fund officer shall withdraw from the plaintiff's account and pay to the Clerk of this Court monthly payments equal to twenty percent (20%) of all deposits credited to plaintiff's account during the preceding month, but only when the amount in the account exceeds \$10, until the entire \$150 filing fee is paid.

Each time that the trust fund officer makes a payment to the Court as required by this order, he shall print a copy of the prisoner's account statement showing all activity in the account since the last payment under this order and file it with the Clerk along with the payment. All payments and account statements shall be sent to:

Clerk, United States District Court, Western District of Tennessee, 262 U.S.  
Courthouse, 111 S. Highland Ave., Jackson, TN 38301

and shall clearly identify plaintiff's name and the case number on the first page of this order.

The obligation to pay this filing fee shall continue despite the immediate dismissal of this case. 28 U.S.C. § 1915(e)(2). If plaintiff is transferred to a different prison or released, he is ORDERED to notify the Court immediately of his change of address. If still confined, he shall provide the officials at the new prison with a copy of this order. If the plaintiff fails to abide by these or any other requirement of this order, the Court may impose appropriate sanctions, including a monetary fine, without any additional notice or hearing by the Court.

The Clerk shall mail a copy of this order to the prison official in charge of prison trust fund accounts at plaintiff's prison. The Clerk is further ORDERED to forward a copy of this order to the Jail Director to ensure that the custodian of the plaintiff's inmate trust account complies with that portion of the PLRA pertaining to the payment of filing fees. However, the Clerk shall not issue process or serve any other papers in this case.

## II. Analysis of Plaintiff's Claims

The complaint alleges that the plaintiff fell three times while incarcerated at the Jail. The first incident occurred on March 20, 2004, while the Jail was on lockdown and inmates were let out for one hour to shower and use the telephone. Plaintiff, who was wearing flip flops, slipped on the stairs, which were wet. The plaintiff asserts he incurred physical injuries and was taken to the medical department, where he was forced to lay on a slab of concrete with a mattress over it. The guards allegedly refused the plaintiff's request for shoes and left him in isolation for eight days.

On May 25, 2004, the plaintiff slipped and fell while leaving the restroom. The plaintiff contends there were no signs warning of the wet floor even though a toilet had overflowed and flooded the area. The plaintiff was taken to isolation for two days and was examined by a doctor. Defendant Fitzpatrick allegedly put the plaintiff in "Deemax," which is not defined, until June 8, 2004. During that time, he had to sleep on a concrete slab. The plaintiff also complains he fell while in "Deemax" on an unspecified date. Plaintiff allegedly injured his hand on glass on the floor. He seeks monetary compensation.

The Sixth Circuit has held that 42 U.S.C. § 1997e(a) requires a federal court to dismiss a complaint without prejudice whenever a prisoner brings a prison conditions claim without demonstrating that he has exhausted his administrative remedies. Brown v. Toombs, 139 F.3d 1102 (6th Cir. 1998); see Porter v. Nussle, 534 U.S. 516, 532 (2002) (“[T]he PLRA’s exhaustion requirement applies to all inmate suits about prison life, whether they involve general circumstances or particular episodes, and whether they allege excessive force or some other wrong.”); Booth v. Churner, 532 U.S. 731 (2001) (prisoner seeking only money damages must exhaust administrative remedies although damages are unavailable through grievance system). This requirement places an affirmative burden on prisoners of pleading particular facts demonstrating the complete exhaustion of claims. Knuckles El v. Toombs, 215 F.3d 640, 642 (6th Cir. 2000). To comply with the mandates of 42 U.S.C. § 1997e(a):

a prisoner must plead his claims with specificity and show that they have been exhausted by attaching a copy of the applicable administrative dispositions to the complaint or, in the absence of written documentation, describe with specificity the administrative proceeding and its outcome.

Knuckles El, 215 F.3d at 642; see also Boyd v. Corrections Corp. of Am., 380 F.3d 989, 985-96 (6th Cir. 2004) (describing the standard for demonstrating exhaustion when prison officials fail to respond in a timely manner to a grievance), *cert. denied*, 125 S. Ct. 1639 (2005); Baxter v. Rose, 305 F.3d 486 (6th Cir. 2002) (prisoner who fails to allege exhaustion adequately may not amend his complaint to avoid a *sua sponte* dismissal); Curry v. Scott, 249 F.3d 493, 503-04 (6th Cir. 2001) (no abuse of discretion for district court to

dismiss for failure to exhaust when plaintiffs did not submit documents showing complete exhaustion of their claims or otherwise demonstrate exhaustion). Furthermore, § 1997(e) requires the prisoner to exhaust his administrative remedies before filing suit and, therefore, he cannot exhaust those remedies during the pendency of the action. Freeman v. Francis, 196 F.3d 641, 645 (6th Cir. 1999). Finally, the Sixth Circuit recently held that district courts are required to dismiss a complaint in its entirety, pursuant to 42 U.S.C. § 1997e(a), that contains any unexhausted claims. Jones Bey v. Johnson, 407 F.3d 801, 805-09 (6th Cir. 2005).

In this case, the plaintiff has not satisfied his burden of demonstrating, through particularized averments, that he exhausted his administrative remedies as to his claims. The plaintiff has not attached copies of any grievances, or responses to grievances, to his complaint. The complaint states only that plaintiff asked defendant Fitzpatrick for a grievance form on August 30, 2004 and was told that they did not have any at the present time. The complaint does not allege that the plaintiff requested a grievance form at any other time or that he attempted to file a grievance without using the official form.

The Sixth Circuit recently stated that “[a] plaintiff who fails to allege exhaustion of administrative remedies through ‘particularized averments’ does not state a claim on which relief may be granted, and his complaint must be dismissed *sua sponte*.” Baxter, 305 F.3d

at 489. Accordingly, the Court DISMISSES the complaint, without prejudice, pursuant to 42 U.S.C. § 1997e(a).<sup>3</sup>

### III. Appeal Issues

The next issue to be addressed is whether plaintiff should be allowed to appeal this decision *in forma pauperis*. Twenty-eight U.S.C. § 1915(a)(3) provides that an appeal may not be taken *in forma pauperis* if the trial court certifies in writing that it is not taken in good faith. The good faith standard is an objective one. Coppedge v. United States, 369 U.S. 438, 445 (1962). An appeal is not taken in good faith if the issue presented is frivolous. Id. Accordingly, it would be inconsistent for a district court to determine that a complaint should be dismissed prior to service on the defendants, yet has sufficient merit to support an appeal *in forma pauperis*. See Williams v. Kullman, 722 F.2d 1048, 1050 n.1 (2d Cir. 1983). The same considerations that lead the Court to dismiss this case for failure to state a claim also compel the conclusion that an appeal would not be taken in good faith.

It is therefore CERTIFIED, pursuant to 28 U.S.C. § 1915(a)(3), that any appeal in this matter by plaintiff is not taken in good faith.

The final matter to be addressed is the assessment of a filing fee if plaintiff appeals the dismissal of this case.<sup>4</sup> In McGore v. Wrigglesworth, 114 F.3d 601, 610-11 (6th Cir.

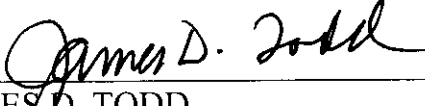
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<sup>3</sup> As the Sixth Circuit has explained, “If the plaintiff has exhausted his administrative remedies, he may always refile his complaint and plead exhaustion with sufficient detail to meet our heightened pleading requirement, assuming that the relevant statute of limitations has not run.” Baxter, 305 F.3d at 489.

<sup>4</sup> Effective November 1, 2003, the fee for docketing an appeal is \$250. See Judicial Conference Schedule of Fees, ¶ 1, Note following 28 U.S.C. § 1913. Under 28 U.S.C. § 1917, a district court also charges a \$5 fee.

1997), the Sixth Circuit set out specific procedures for implementing the PLRA. Therefore, the plaintiff is instructed that if he wishes to take advantage of the installment procedures for paying the appellate filing fee, he must comply with the procedures set out in McGore and § 1915(a)-(b).

IT IS SO ORDERED this 29<sup>th</sup> day of November, 2005.

  
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JAMES D. TODD  
UNITED STATES DISTRICT JUDGE





## Notice of Distribution

This notice confirms a copy of the document docketed as number 5 in case 1:05-CV-01026 was distributed by fax, mail, or direct printing on December 2, 2005 to the parties listed.

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Allen Kinney  
Northpoint Training Center  
#182302  
P.O. Box 479  
Dorm 6  
Burgin, KY 40310

Honorable James Todd  
US DISTRICT COURT